

REMARKS/ARGUMENTS

The January 6, 2009, Office Action, summarily rejected claims 1-30 as being obvious over U.S. Pat. No. 6,193,079 to Wiemer in view of U.S. Pat. No. 6,464,089 to Rankin. Claims 1, 4, 8, 11, 24, and 28 are amended herein, claims 2-3, 5-7, 9-10, 12-23, 25-27, and 29-30 are canceled. Claims 1, 4, 8, 11, 24, and 28 remain pending in this application and are presented herein for reconsideration in light of the amendments and arguments made herein.

After reciting the *Graham v. John Deere* factors for consideration in determining whether claims are obvious under 35 U.S.C. § 103, the January 6, 2009, Office Action summarily concludes that all the pending claims are obvious without any fact-finding or supporting rationale as suggested in the *Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in View of the Supreme Court Decisions in KSR International Co. v. Teleflex Inc.*, 72 Fed. Reg. 57,526 (Oct. 10, 2007) (referred to herein as the “*Examination Guidelines*”):

When making an obviousness rejection, Office personnel must therefore ensure that the written record includes findings of fact concerning the state of the art and the teachings of the references applied. In certain circumstances, it may also be important to include explicit findings as to how a person of ordinary skill would have understood prior art teachings, or what a person of ordinary skill would have known or could have done. Factual findings made by Office personnel are the necessary underpinnings to establish obviousness.

Once the findings of fact are articulated, Office personnel must provide an explanation to support an obviousness rejection under 35 U.S.C. 103. 35 U.S.C. 132 requires that the applicant be notified of the reasons for the rejection of the claim so that he or she can decide how best to proceed.

The Action recites where certain features or functionality can be found in the cited prior art references but then summarily concludes that combining certain elements of the references “would have been obvious for one having ordinary skill in the art at the time of the invention.”

There is no finding as to the level of skill of a person having ordinary skill in the relevant art. There is no reasoned application of the prior art to the elements recited in the claims presented. Rather, all thirty of the claims are rejected in a single conclusory sentence without any explanation of the rationale for combining them to find the claims obvious..

As explained in the *Examination Guidelines* at page 57,527, the U.S. Supreme Court in *KSR v. Teleflex*, 82 USPQ2d 1385 (2007), made clear that the articulation of the reasoning for an obviousness refusal must be made explicit: “rejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinnings to support the legal conclusion of obviousness.” 82 USPQ2d at 1396. The Supreme Court’s guidance on the factual findings and logical rationale required for making an obviousness rejection were not followed in the January 6, 2009, Office Action and Applicants respectfully request withdrawal of the rejection. Indeed, if the substance of the claims had been thoroughly reviewed on an element by element basis, their allowability would be apparent.

Independent claims 1 and 24, as amended herein for clarification purposes, recites a track with a biasing mechanism mounted thereon to move articles hanging on a member underneath the track from the rear to the front of the merchandising system. While not technically required under *KSR* for an obviousness rejection, there is no teaching, suggestion, or motivation in the cited prior art to combine the two items to result in such a configuration. Applicants further do not believe that there are any other rationales or motivations, other than hindsight, for picking and choosing among certain elements from one of the prior art patents to arrive at the invention

presently recited in claim 1. As such, these claims and the claims depending therefrom are believed to be in condition for allowance.

Independent claim 24 further adds that the pusher element includes an aperture therein through which the member extends as the pusher advances along the track. Even assuming that there were some rationale for combining the cited prior art references, neither of them have such a feature. In fact, if the upper tag support bar 26 from Wiemer were replaced with an inverted pusher plate 34 from Rankin, and a hole was drilled through the pusher plate, the product support bar 30 from Wiemer would smash into the Wiemer spring 20. As such, not only would the two cited references need to be combined to arrive at the claim 24 invention, but substantial redesign and modifications to the resulting combination would have to be accomplished. As such, claim 24 and the claim depending therefrom is believed to be in condition for allowance.

CONCLUSION

In view of the response made herein, Applicant respectfully submits that claims 1, 4, 8, 11, 24, and 28 are in condition for allowance, and requests reconsideration of the same. Applicant requests that the Examiner telephone the undersigned in the event a telephone discussion would be helpful in advancing the prosecution of the present application. The Director is authorized to charge any additional fees or underpayment of fees regarding this response, including extensions for reply, to Deposit Account 07-1509.

Respectfully submitted,

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